Supreme Court, U.S.
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No. 05-1404

IN THE

Supreme Court of the United States

GALLENTHIN REALTY DEVELOPMENT, INC.;
GEORGE A. GALLENTHIN, III, LTC, HUSBAND;
CYNTHIA L. GALLENTHIN, WIFE,

Petitioners,

v.

BP PRODUCTS OF NORTH AMERICA, INC., D/B/A BP OIL COMPANY; ESSEX CHEMICAL CORPORATION; DOW CHEMICAL COMPANY; COMMERCE BANK/HARRISBURG NATIONAL ASSOCIATION, D/B/A COMMERCE BANK, N.A.; TRIAD ADVISORY SERVICES, INC., D/B/A TRIAD ASSOCIATES, INC.; URS CORPORATION; PARKER MCCAY & CRISCUOLO, P.A.; GLOUCESTER COUNTY IMPROVEMENT AUTHORITY; BOROUGH OF PAULSBORO

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS BP PRODUCTS OF NORTH AMERICA, INC., ESSEX CHEMICAL CORPORATION, AND DOW CHEMICAL COMPANY

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QUESTIONS PRESENTED

I. Whether Petitioners' claim of maritime fraud is nothing more than a claim of common law fraud, and hence beyond the scope of federal subject matter jurisdiction.

II. Whether the River and Harbor Improvement Act, 33 U.S.C. § 540, contains an implied private right of action, when there has been no showing by Petitioners that they are part of the class for whose special benefit the statute was enacted.

III. Whether the dormant Commerce Clause provides a basis for the exercise of federal jurisdiction where the facts alleged implicate only a private individual's challenge to a municipality's exercise of its power to enact local land use laws and does not burden or affect interstate commerce.

CORPORATE DISCLOSURE STATEMENT

BP Company of North America, Inc. and The Standard Oil Company are the parent companies of Respondent BP Products North America, Inc. BP P.L.C. is the only publicly held company that owns 10% or more of the Respondent BP Products North America, Inc.'s stock.

The Dow Chemical Company ("Dow") is a publicly held corporation and the parent corporation of Essex Chemical Corporation ("Essex") and Dow owns all of the stock of Essex. No corporation owns 10% or more of Dow's stock. Dow does not have a parent corporation.

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Rule:

Sup. Ct. R. 10 11

Respondents BP Products North America, Inc., Essex Chemical Corporation, and Dow Chemical Company (collectively "Respondents") respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Third Circuit's opinion in this case. The opinion of the Third Circuit may be found at 2006 U.S. App. LEXIS 1722.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 1a-10a) is unreported and is not precedential.

The Opinion of the United States District Court for the Eastern District of Pennsylvania (Pet. App. 11a-18a), which was issued on February 18, 2005, following the District Court's February 14, 2005 Order granting Respondents' motions to dismiss and denying Petitioners' motion to dismiss or in the alternative leave to amend the complaint, explains in detail the basis for its decision. The Order and Opinion of the District Court are unreported.

Petitioners fail to state in their Petition for a Writ of Certiorari all of the reasons upon which the District Court granted the Respondents' motions to dismiss and denied the Petitioners' motion to amend. In addition to dismissing the Petitioners' Complaint for lack of subject matter jurisdiction, the District Court properly granted the Respondents' motions to dismiss, in the alternative, for lack of ripeness and pursuant to the doctrine of abstention. Likewise, the District Court denied the Petitioners' motion to amend for lack of ripeness and under the doctrine of abstention because, although "plaintiff's property has been designated an 'area in need of redevelopment,' no declaration of taking has been filed by the Borough [of Paulsboro]. Until plaintiff's property is condemned, and the condemnation approved by the New Jersey courts, it is unlikely that a controversy exists." (Pet. App. 17a).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on January 24, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Art. I, § 8, Cl.3 provides in relevant part: "The Congress shall have Power . . . [t]o regulate Commerce . . . , among the several States. . . ."

28 U.S.C. § 1291.

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1331. "The district courts shall have original jurisdiction of all civil actions arising under the Constitutions, laws, or treaties of the United States."

33 U.S.C. § 540 *et seq.*

> Federal investigations and improvements of rivers, harbors, and other waterways shall be under the jurisdiction of and shall be prosecuted by the Department of the Army under the direction of the Secretary of the Army and the supervision of the Chief of Engineers, except as otherwise specifically provided by Act of Congress, which said investigations and improvements shall include a due regard for wildlife conservation.

STATEMENT OF THE CASE

A. Jurisdiction of the Courts Below

The United States Court of Appeals for the Third Circuit exercised its jurisdiction over this matter pursuant to 28 U.S.C. § 1291.

Petitioners misstate the jurisdiction of the United States District Court for the Eastern District of Pennsylvania. The District Court determined it lacked federal question jurisdiction over the claims, notwithstanding the Petitioners' invocation of 28 U.S.C. § 1331, the River and Harbor Improvements Act, 33 U.S.C. § 540 *et seq.*, and the Commerce Clause of the United States Constitution, Article 1, Section 8, Clause 3, as the bases for jurisdiction. The District Court, in its Memorandum Opinion of February 18, 2005 (Pet. App. 11a-18a), ruled that: (1) the River and Harbor Improvements Act did not provide a private right of action and, therefore, could not afford Petitioners' a predicate for jurisdiction, regardless of whether the alleged violations occurred; and (2) the Commerce Clause did not offer a basis

for the exercise of federal question jurisdiction because Petitioners failed to allege any facts that would suggest that the Borough of Paulsboro's designation of Petitioners' property as an area in need of redevelopment materially affected interstate commerce. Rather, the facts, as alleged, constitute nothing more than a private individual's challenge to a municipality's exercise of its power to enact local land use laws. Further, the District Court held that amendment of the Petitioners' Complaint would be futile because the Petitioners' claims are not ripe and the doctrine of abstention would prohibit the exercise of jurisdiction by the District Court.

B. Facts

Respondents incorporate by reference herein the statement of the facts set forth in the opinion of the United States Court of Appeals for the Third Circuit.

REASONS FOR DENYING THE PETITION

A. Neither in the Questions Presented in the Petition Nor in the Court Below did the Petitioners' Contest the District Court's Dismissal of the Complaint Under the Doctrine of Abstention, Which Failure Acts as a Waiver.

In dismissing the Complaint, the District Court relied, as an independent and alternative basis for dismissal, on the lack of ripeness of the Petitioners' claims and on the doctrine of abstention. Neither ripeness nor abstention were raised in Petitioners' appeal to the Third Circuit, and the Petitioners failed to present any legal arguments on these issues in their brief to the Third Circuit. Accordingly, Petitioners' waived their right to appeal these issues and the District Court's dismissal of the Complaint on these grounds.

Despite such waiver, and despite having failed to raise it as a question presented in the Petition, Petitioners have improperly inserted into their Petition an argument contesting the District Court's reliance on the doctrine of abstention as a basis for the dismissal of the Complaint. Having waived in the Appellate Court their right to contest the dismissal of the Complaint for lack of ripeness and abstention, this Court should not grant Petitioners certiorari to now contest the District Court's application of the doctrine of abstention. *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n.2, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970); *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 212-13, 118 S. Ct. 1952, 141 L. Ed. 2d 215 (1998); *Delta Airlines v. August*, 450 U.S. 346, 362, 101 S. Ct. 1146, 67 L. Ed. 2d 287 (1981)("question presented in petition but not raised in court of appeals is not properly before us"); *United States v. United Foods, Inc.*, 533 U.S. 405, 121 S. Ct. 2334, 150 L. Ed. 2d 438 (2001)(refusing to consider arguments by petitioner not pressed below). Compare *Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23, 102 S. Ct. 2690, 73 L. Ed. 2d 349 (1982) and *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) (both holding that "purely legal questions" presented in a petition may be appropriate for decision even though not addressed by the lower court).

Even if the Court were to consider the Petitioners' argument against application of the doctrine of abstention as a basis for dismissal of their Complaint, the Petition must still be denied as the Petitioners' argument lacks legal merit. Petitioners' rely, erroneously, on maritime law as the basis for their argument that their federal action should take precedence over their previously filed New Jersey state court action. Missing from Petitioners' argument, however, is any indication of the maritime activity at issue. Rather, as

properly noted by both the Third Circuit and the District Court, Petitioners' claims concern, solely, a purported scheme by the Respondents to deprive the Petitioners' of their property rights through the enactment of a local land use ordinance. In this context, and relying on this Court's previous decision in *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed 2d 669 (1971) and on the Third Circuit's previous decision in *Gwynedd Properties, Inc. v. Lower Gwynedd Township*, 970 F.2d 1195 (3d Cir. 1992), the District Court held, correctly, that ". . . the legality of a local land use ordinance entails special state interests" (Pet. App. 18a, n.10) for which New Jersey law provides a mechanism to condemnees "to challenge any aspect of a condemnation in state court." (Pet. App. 18a, n.10). Accordingly, federal abstention is appropriate in this case where the Petitioners' state court appeal challenging a local land use ordinance remains pending.

B. Petitioners' Complaint Fails to Allege and the Facts and Arguments Before the Lower Court do not Support Petitioners' New Claim of Maritime Fraud Against Respondents.

A plain reading of Count II of the Petitioners' Complaint and the arguments advanced by the Petitioners in the lower court clearly evidence that the Petitioners' fraud claim is premised upon Pennsylvania common law, not maritime law. Petitioners concede in their brief to the Appellate Court (p. 25) that Count II of their Complaint is an attempt to allege a "claim for fraud under Pennsylvania law." It is axiomatic that a common law claim of fraud does not "arise under" the Constitution or laws of the United States and therefore does not give rise to federal jurisdiction. 28 U.S.C. § 1331;

Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63, 107 S. Ct. 1542, 95 L. Ed. 2d 55 (1987).[1]

Even assuming, arguendo, that the Petitioners pled a claim of fraud under maritime law, the facts as alleged fail to establish a prima facie case of fraud in the maritime context so as to invoke federal subject matter jurisdiction. The propriety of admiralty jurisdiction over particular torts, such as fraud, depends on the tort's locality and its relationship to "traditional maritime activity." *Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 115 S. Ct. 1043, 130 L. Ed. 2d 1024 (1995). A party seeking to invoke federal admiralty jurisdiction over a tort claim must establish both the tort's locality on navigable water and a connection with traditional maritime activity. *Id.*; *see also Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 U.S. 249, 253-258, 93 S. Ct. 493, 34 L. Ed. 2d 454 (1972); *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 102 S. Ct. 2654, 73 L. Ed. 2d 300 (1982); *Sisson v. Ruby*, 497 U.S. 358, 110 S. Ct. 2892, 111 L. Ed. 2d 292 (1990). The locality test requires a court to determine whether the alleged tort occurred on navigable water or whether the injury suffered on land was caused by a vessel on navigable water. *Grubart, Inc.* 513 U.S. at 527, 534, 155 S. Ct. at 1045, 1048 (1995). Further, in determining if a connection exists between the alleged tort and traditional maritime activity, a court must first determine whether the incident has "a potentially disruptive impact on maritime commerce" and second whether the activity which caused the incident has a connection with "traditional maritime activity." *Id.* (*quoting Sisson v. Ruby*,

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1. As aptly noted by the District Court, "[t]here is no basis for diversity jurisdiction, inasmuch as all plaintiffs and some defendants are citizens of Pennsylvania" (Pet. App. 14a, n. 6).

497 U.S. at 363, 364 n.2 and 365). Respondents' alleged fraudulent conduct in attempting to thwart Petitioners' proposed redevelopment plan and thereby deprive Petitioners' of their property rights fails to satisfy either the locality test or the connection test. Rather, the conduct of Respondents as alleged by Petitioners is entirely separate from any maritime activities that may occur in the waters that boarder the Petitioners' property. Simply labeling a claim as "maritime" does not make it so.

C. The Court Below Fully Considered and Correctly Decided that No Private Right of Action Exists Under the River and Harbor Improvements Act, 33 U.S.C. § 540.

The Appellate Court correctly decided that no express or implied private right of action exists under the River and Harbor Improvements Act (the "Act") based upon the prior well reasoned decisions of the Ninth Circuit and this Court.

First, relying on the Ninth Circuit's decision in *Boatowners and Tenants Assoc., Inc. v. Port of Seattle*, 716 F.2d 669 (9th Cir. 1983), the Appellate Court correctly determined that the Act does not provide an express private right of action to persons purportedly injured by violations of its provisions, but rather grants to the Army Corps of Engineers the authority "to conduct investigations and improvement of rivers, harbors and waterways, to grant easements on lands acquired by the United States for river and harbor improvements, to approve the plans of private persons or municipal corporations who desire to improve navigable rivers. . . ." (Pet. App. 7a).

Second, relying again on the decision in *Boatowners and Tenants Assoc., Inc., supra* and citing to this Court's previous decision in *California v. Sierra Club*, 451 U.S. 287, 101 S. Ct. 1775, 68 L. Ed. 2d 101 (1981), the Appellate Court determined that Petitioners

> failed to establish that the Act impliedly creates a private cause of action by demonstrating that they are 'one of the class for whose especial benefit the statute was enacted,' that Congress intended to create a private right of action for individuals in their class, or that their cause of action is not one traditionally relegated to state law (and thus inferring a cause of action based solely on federal law).

(Pet. App. 8a). Notably, no conflict exists in either the Third Circuit or among the Circuits on this issue.

Petitioners fail to provide the Court with a justifiable basis upon which certiorari may be granted to consider the Appellate Court's well reasoned decision on this issue. Instead, Petitioners' misstate in their Petition the basis upon which the Appellate Court reached its decision. Contrary to the Petitioners' argument, neither the Ninth Circuit's opinion in *Boatowners and Tenants Assoc., Inc., supra* nor the Appellate Court's analysis and ultimate determination in this case are fact sensitive. Rather, both decisions turn on an interpretation of the legislature's intent gleaned from a review of the language in the Act – a purely legal analysis.

D. The Lower Court's Decision That the Dormant Commerce Clause Does Not Give Rise to Federal Subject Matter Jurisdiction Over Petitioners' Claims Follows Supreme Court Precedent.

Far from ignoring or misapplying the precedent of this Court, as alleged in the Petition, the Appellate Court actually relied upon and cited to the very Supreme Court precedent which the Petitioners claim was ignored. Notably, the quotations to which the Petitioners reference in the matters of *Lewis v. B.T. Investment Managers, Inc.*, 447 U.S. 27, 100 S. Ct. 2009, 64 L. Ed. 2d 702 (1980) and *Harvey & Harvey, Inc. v. City of Chester*, 68 F.3d 788 (3d Cir. 1995) were cited by the Appellate Court in its analysis of the Petitioners' Commerce Clause claim.

Specifically, in considering this Court's recognition of the limits on the power of the States to erect barriers against interstate trade, as discussed in *Lewis, supra*, the Appellate Court properly framed the issue as "whether the Borough's ordinance approving the designation of Plaintiffs' property as an 'area in need of redevelopment' violates the dormant Commerce Clause." (Pet. App. 9a). The Appellate Court correctly analyzed this issue within the framework established by this Court in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 114 S. Ct. 1677, 128 L. Ed. 2d 399 (1994) and its own prior decision in *Harvey & Harvey, Inc., supra* In this regard, the Appellate Court recognized that "while the purpose of the dormant Commerce Clause is to prevent state and local governments [from using] their regulatory power to favor local enterprise by prohibiting patronage of out-of-state competitors or their facilities," *C & A Carbone, Inc.*, 511 U.S. at 394, its purpose "is not to protect individual firms. *Harvey & Harvey, Inc.*, 68 F.3d at 798.

Within this framework, the Appellate Court correctly determined that the Petitioners' failed to allege any facts suggesting that the Borough of Paulsboro's designation of their property as an "area in need of redevelopment" unduly burdens or materially affects interstate commerce such that the District Court could properly exercise subject matter jurisdiction over the Petitioners' claims. The Petitioners again fail to allege in their Petition any facts to suggest that the Borough's decision burdens or affects interstate commerce. At best, the Petition merely quibbles with the lower court's interpretation of the Petitioners' factual allegations, which is not a proper basis upon which to grant certiorari. *See* Sup. Ct. R. 10.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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